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Supreme Court, U.S.
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Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY

Petitioner,

v.

DELBERT COPPLE, CARL HEINRICHSMEYER, and DONALD HYATT

Respondents.

On Petition For a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

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PETITION FOR WRIT OF CERTIORARI

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AUGUST 27, 2008

QUESTION PRESENTED

In *Norfolk & Western Ry. Co. v. Ayers*, the Court held that asbestos plaintiffs diagnosed with asbestosis can recover damages for fear of contracting cancer in the future, so long as that fear is "genuine and serious." The question presented here is whether it was error for the court below, in conflict with this Court's precedent and at least one lower court, to award damages for fear of contracting cancer in the future where the plaintiffs' only evidence that the fear was "genuine and serious" was the plaintiffs' own subjective testimony of generalized worry, uncorroborated by objective evidence of serious fear.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties in the action below, but have no interest in this petition:

Xon Blackburn
Herlie Bowerman
George Briggs
James Callahan
Lonnie Davis
Joseph Denk
Marvin Donoho
David Eversgerd
Tom Gilliland
Juan Gonzalez
Daniel Hogan
Robert Jerkatis
Vernon Landers
Bert Rostance
Donald Smith
Robert Spencer
Forrest Stewart, Jr.
Thomas Mitchell
Norman Wilkey
Herbert Williams
Versey Williams
Peter Yurasovich

RULE 29.6 STATEMENT

Illinois Central Railroad Company is a wholly-owned subsidiary of Illinois Central Corporation, which is a wholly-owned subsidiary of Grand Trunk Corporation, which is a wholly-owned subsidiary of Canadian National Railway Company, a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Illinois Central Railroad Company ("Illinois Central") respectfully submits this petition for a writ of certiorari to review the judgment of the Illinois Supreme Court.

OPINIONS BELOW

The judgment for which review is sought is decision of the Appellate Court of Illinois, Fifth District, which affirmed the judgment of the Circuit Court for Marion County, Illinois in *Xon Blackburn et al. (Delbert Copple, et al.) v. Illinois Central Railroad Co.*, No. 5-06-0618. After the presentation of the plaintiffs' evidence and after a jury verdict in favor of the plaintiffs, the Circuit Court of Marion County denied Illinois Central's motion for directed verdict. The circuit court likewise denied Illinois Central's post-trial motion for judgment notwithstanding the verdict, motion for a new trial, and motion to remit damages for pain and suffering and for future medical expenses. The orders of the circuit court denying Illinois Central's motions are not published and are reflected in a docket entry that is reproduced in the Petition Appendix ("Pet. App.") at p. 121a. The opinion of the Appellate Court of Illinois, Fifth District, is reported at 379 Ill.App.3d 426 and 882 N.E.2d 189 and is reproduced at Pet. App. 1a-43a. The Illinois Supreme Court's order denying Illinois Central's petition for appeal is not published and is reproduced at Pet. App. 44a.

JURISDICTION

The order of the Supreme Court of Illinois was entered on May 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

The relevant provision of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, 53 and 56, are reproduced at Pet App. 45a-48a.

STATEMENT

In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 157 (2003), the Court decided that a plaintiff with asbestos-related disease may seek compensation for fear of contracting cancer in the future as an element of pain and suffering, subject to an "important reservation": The plaintiff must prove that the alleged fear is "genuine and serious." *Id.* at 158. The Court further noted that, while the question of whether the *Ayers* complainants had met this burden was not before the Court, their evidence of fear, which consisted solely of subjective evidence of concern uncorroborated by objective evidence of actual fear, was "notably thin." *Id.* & n.19. The Court made clear that objective evidence is likely necessary but left open the question of precisely what type of objective evidence a complainant must adduce to satisfy the "genuine and serious" requirement. *Id.* n.18.

The court below departed from the "genuine and serious" requirement of *Ayers*. Specifically, the trial court allowed the jury to award damages for fear of cancer to plaintiffs claiming to suffer from asbestos-

related disease based solely on the same type of subjective evidence the Court correctly characterized in *Ayers* as "notably thin" and likely insufficient. The decision of the court below thus reflects a definition of "genuine and serious" that is at odds with the standard contemplated in *Ayers* and conflicts with the definition adopted by at least one other jurisdiction. *See Seaford v. Norfolk S. Ry. Co.*, 824 N.E.2d 94, 111-12 (Ohio Ct. App. 2004), *rev'd on other grounds*, 835 N.E.2d 717 (Ohio 2005).

This case presents the important question left open in *Ayers*: whether plaintiffs with asbestos-related disease can seek damages for fear of future cancer where the only evidence that the fear was "genuine and serious" is the plaintiffs' own subjective testimony of generalized worry, uncorroborated by objective evidence of serious fear.

Statutory Background

Congress enacted FELA as a broad remedial statute to ensure relief for injured railroad employees who work under perilous conditions. *See Urie v. Thompson*, 337 U.S. 163, 181 (1949). Consistent with its remedial nature, FELA lowers certain common-law hurdles that historically prevented recovery for plaintiffs. *See, e.g.*, 45 U.S.C. § 53 (removing contributory negligence as a bar to recovery).

Nonetheless, railroad employers are not insurers of an employee's welfare under FELA. *See Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959). Liability is predicated on proof that the railroad's negligence caused injury to the employee. Absent express statutory departures from the common law, the requisite negligence under FELA is founded on

the common-law concepts of negligence "as established and applied in the federal courts." *Urie*, 337 U.S. at 174; see also *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 493 (1980) ("It has long been settled that questions concerning the measure of damages in an FELA action are federal in character."). The scope of FELA is "a federal question, not varying in accordance with differing conceptions of negligence applicable under state and local laws." *Urie*, 337 U.S. at 174. Indeed, one of the purposes of FELA was to "create uniformity throughout the Union" with respect to the "financial responsibility of railroads for injuries to their employees." H.R. Rep. No. 60-1386, at 3 (1908). Uniformity is vital in light of the wide latitude FELA plaintiffs have to select a forum. *See* 45 U.S.C. § 56.

To ensure uniformity, guidance from this Court is essential to the proper administration of FELA. In the absence of express statutory provisions, the Court accords "great weight" to evolving common-law principles in delineating the unspecified bounds of recover under FELA. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994).

Because the text of FELA is silent on the issue raised in this petition, the issue must be resolved based on evolving principles of common law adapted to the circumstances of the railroad industry. *Id.* at 555-56. Although the Court held in *Ayers* that a plaintiff with asbestos-related disease can recover damages for fear of cancer only on a proper showing that the fear is "genuine and serious" and strongly suggested that this burden requires more than the complainant's own testimony of subjective worry, it expressly left open the question of what quantum and type of objective evidence are necessary to

establish a genuine and serious fear. This question leaves a fundamental gap in FELA doctrine that requires immediate resolution.

Factual Background

The plaintiffs below are three former employees of Illinois Central. Each asserted claims against Illinois Central under FELA, claiming that Illinois Central failed to provide a reasonably safe workplace due to their exposure to asbestos on the job. The plaintiffs alleged that they had contracted asbestosis and sought damages.

The plaintiffs first learned that they had contracted asbestosis on April 9, 2003, at a screening for retired railroad workers arranged by plaintiffs' counsel. None of the plaintiffs was diagnosed with asbestosis by his personal treating physician. Likewise, defendant's pulmonologist and radiologist examined each plaintiff and identified no abnormality relating to asbestos and no basis for the diagnosis of asbestosis.

Each plaintiff sought damages for, among other things a claimed concern about the possibility of contracting cancer sometime in the future.[1] None of the plaintiffs, however, presented objective evidence of fear of cancer. Indeed, the only evidence of concern regarding cancer was the plaintiffs' own testimony. And even this subjective testimony describes something less than "serious" fear.

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[1] These plaintiffs were but three of twenty-five party plaintiffs in the underlying action. Under the trial court's case management plan, claims of plaintiffs are to be tried in smaller groupings. The trial of the claims of respondents here was the second trial in the case.

Plaintiff Delbert Copple is 79 years old. At trial, Mr. Copple testified that he is "enjoying retirement" and that he suffered no true symptoms of asbestos-related injury, other than getting "winded" when he climbs stairs or exercises. Pet. App. 49a-50a. He did not testify to any actual "fear" of cancer. Instead, he merely stated, "Well, I'm concerned about it. I'm even worried about it." Pet. App. 51a. But, this "concern" or "worry" has not interfered with his daily life. Pet. App. 51a. He has not seen a psychologist, psychiatrist, or his treating physician for any stress or anxiety over the possibility of contracting cancer, and has requested no medication for stress or anxiety. Pet. App. 51a-52a. Underscoring his lack of any fear, Mr. Copple testified that the majority of information he learned about asbestos potentially causing cancer came from hearing the *trial* testimony of his expert. Pet. App. 52a-53a.

Plaintiff Carl Heinrichsmeyer is 62 years old and testified that he had no injury resulting from his alleged asbestosis. Pet. App. 55a. Although he cannot do as much as used to, he attributed that mainly to diabetes. Pet. App. 55a, 57a. Mr. Heinrichsmeyer has no fear of cancer whatsoever, testifying only that he is uncertain of the future. Pet. App. 54a. He simply said he is worried about taking care of his family in the event he contracts cancer. "Well, right now all my ducks aren't in a row, and I'm going to have to get my life better and have things set up better to take care of my family and what's left. If I'd go, we're not in real good shape right now. It's more of a day to day thing taking care of my future. I need to think about that now." Pet. App. 54a. His concern, however, does not make him "feel bad" or interfere with his daily life. Pet. App.

56a-57a. He has neither sought the advice of a psychologist or psychiatrist concerning any fear of cancer nor taken any medication for stress or anxiety. Pet. App. 56a-57a.

Plaintiff Donald Hyatt is 70 and testified to no fear of cancer at all, and certainly none that was "genuine and serious." Pet. App. 58a. He has never discussed his alleged fear with his treating physician or a psychologist, nor has he taken any stress or anxiety medication. Pet. App. 59a. Mr. Hyatt testified only that he had shortness of breath when he climbs stairs or pushes a lawn mower, symptoms which developed one month before trial and do not relate to Mr. Hyatt's alleged fear of cancer. Pet. App. 60a-62a.

Despite the lack of true evidence of genuine and serious fear, the court below denied Illinois Central's motion for directed verdict. The trial court then compounded this error by issuing the following jury instruction, which strongly suggested that the question of whether plaintiffs' fear of cancer was "genuine and serious" was a foregone conclusion:

> If you decide for the plaintiff . . . on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages . . . .
>
> *The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future.*

Pet App. 63a (emphasis added). In offering this instruction, the Court rejected two proposed instructions offered by Illinois Central. The first: "In order to recover for fear of cancer, a plaintiff must demonstrate that his fear is genuine and serious. This means fear that significantly and detrimentally affects the ability to carry on every day life and work." Pet. App. 64a. The second: "In order to recover for fear of cancer, a plaintiff must prove that it is more probably true than not true that his fear is genuine and serious." Pet. App. 65a.

On June 1, 2006, the jury returned a verdict in favor of Plaintiffs Copple and Hyatt for $220,000 each and Plaintiff Heinrichsmeyer for $167,000. Pet App. 66a-68a. The jury granted all three plaintiffs identical awards ($30,000) for fear of cancer.[2]

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the conflict over the evidentiary burden an asbestosis plaintiff must meet to establish a "genuine and serious" fear of contracting cancer. The Court in *Ayers* left open the question of the precise type and quantum of evidence a plaintiff must introduce to support a claim for fear of cancer. But consistent with the Court's previous opinions regarding the recovery of emotional distress damages under FELA,

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[2] In the trial of the first grouping of plaintiffs, the plaintiffs presented almost identical evidence of fear of cancer. Pet. App. 68a-76a. But, the Court in that first trial issued an instruction similar to one proposed by Illinois Central in the second trial ("In order to recover for fear of cancer a plaintiff must demonstrate that fear is genuine and serious"), and the jury declined to award damages for fear of cancer. Pet. App. 77a-80a.

the Court made clear that the emotional harm must be "genuine and serious" and supported by objective evidence, not merely the plaintiff's own subjective testimony.

The lower courts are split over what evidence is necessary to show "genuine and serious" fear. Illinois and other jurisdictions have endorsed a standard that effectively eviscerates the "important reservation" the Court imposed in *Ayers* and would allow recovery even on the "notably thin" showing that the Court in *Ayers* considered likely insufficient. At least one other court has applied a stricter standard that is consistent with *Ayers* and would require evidence other than the plaintiff's testimony of generalized concern.

The Court should resolve this conflict and confirm what *Ayers* and other FELA precedent make plain: damages for emotional distress are not recoverable under FELA when supported only by the plaintiff's subjective testimony of generalized concern.

I. The Court Below Ignored This Court's Repeated Admonition That Emotional Distress Claims Under FELA Must Be Supported By Objective Indicia Of Serious Injury.

The Court's emphasis in *Ayers* that fear of cancer must be "genuine and serious" to allow recovery is but the latest admonition by the Court that claims for emotional distress under FELA must be supported by objective evidence of serious injury.

In *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557 (1987), the Court first confronted the question of whether and to what extent emotional injuries are

compensable under FELA. The Court noted that, to the extent damages for emotional distress may be recoverable under the common law, "severe emotional injury . . . has generally been required," and that "in the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character." *Id.* at 566-67 n.13, 569 n.18.

In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 550 (1994), the Court held for the first time that damages for emotional distress injuries are recoverable under FELA. The Court nonetheless emphasized that "significant restrictions" on the recovery of such damages are in order given the "possibility of fraudulent claims that are difficult for judges and juries to detect." *Id.* at 557. Thus, the Court adopted the "zone of danger" test to limit the scope of cognizable claims, again emphasizing the need for objective indicia to separate meritorious from invalid claims. *Id.* at 554-55.

In *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 433-34 (1997), the Court again pointed to the special difficulty of distinguishing meritorious claims of emotional distress from fraudulent claims. There, the plaintiff sought to recover damages for fear of cancer due to his extensive exposure to asbestos dust on the job, notwithstanding that he suffered no asbestos-related disease. The Court held that mere exposure to asbestos is not a "physical impact" that would satisfy *Gottshall*'s zone of danger test. Importantly, concurring in the judgment, Justice GINSBURG observed that, even had the *Gottshall* test been satisfied, Buckley's claim would fail because he "did not present objective evidence of severe emotional distress." *Id.* at 445 (GINSBURG,

J., concurring with the judgment in part and dissenting in part). "Buckley testified at trial that he was angry at Metro-North and fearful of developing an asbestos-related disease. However, he sought no professional help to ease his distress, and presented no medical testimony concerning his mental health. Under these circumstances, Buckley's emotional distress claim fails as a matter of law." *Id.*

Buell, *Gottshall* and *Buckley* thus share a common thread. Regardless of the applicability of the various threshold tests that winnow the class of potential plaintiffs, damages for emotional distress are recoverable only where the emotional injury complained of is serious and supported by more than complainant's subjective testimony.

The Court's decision in *Ayers* picks up this thread and carries it forward. Respecting the threshold qualification for recovery of "fear" damages, the Court in *Ayers* distinguished a plaintiff with asbestosis from the disease-free plaintiff in *Buckley*. In that circumstance, the threshold test is satisfied and recovery is allowed. Still, as made clear in *Buell*, *Gottshall*, and *Buckley*, even where the plaintiff meets the threshold test for recovery, "[i]t is incumbent upon such a complainant . . . to prove that his alleged fear is 'genuine and serious.'" *Ayers*, 538 U.S. at 158.

The Court did not expressly decide what evidence would be necessary to show a "genuine and serious" fear of cancer, *id.* at 158 n.17, but made clear that some form of objective testimony likely is necessary. Specifically, the Court highlighted the "notably thin" proof that the plaintiffs had offered:

> [O]ne of the claimants did not testify to having any concern about cancer;

> another testified that he was more afraid of shortness of breath from his asbestosis than of cancer. Others testified to varying degrees of concern over developing the disease; no claimant presented corroborative objective evidence of his fear.

Id. at 158, n.18. This proof, noted the court, "might well have succumbed to a straightforward sufficiency of the evidence objection, had Norfolk so targeted its attack." *Id.* at 158.

Importantly, Justice BREYER in dissent offered a standard that the Court considered consonant with its "genuine and serious" standard. "I would, consistent with the sense of the common law, permit recovery where the fear of cancer is unusually severe—where it significantly and detrimentally affects the plaintiff's ability to carry on with every day life and work." *Id.* at 187 (BREYER, J., dissenting). The majority in *Ayers* declined to adopt this definition of "genuine and serious" given that it "was not aired in the trial court or in this Court," *id.* at 158 n.18, but nonetheless viewed the standard as a mere "elaboration" on the "genuine and serious" requirement the Court imposed. Indeed, such a standard, which likely would require "medical testimony concerning [the complainant's] mental health" or at least that the complainant had "sought . . . professional help" to deal with his fear, is consistent with the view previously expressed by Justice GINSBURG, the author of the Court's opinion in *Ayers*. *Buckley*, 521 U.S. at 445 (GINSBURG, J., concurring with the judgment in part and dissenting in part).

The proof offered by the plaintiffs here falls well short of this standard. None of the plaintiffs offered more than subjective testimony of "worry" or "concern." None offered corroborating objective evidence that fear of cancer significantly or detrimentally affected his day-to-day life. *Cf. Ayers*, 538 U.S. at 158 n.17. None offered medical testimony regarding the severity of the fear. *Cf. Buckley*, 521 U.S. at 445 (GINSBURG, J., concurring with the judgment in part and dissenting in part). Under this Court's prior opinions, this proof was plainly insufficient and should have been rejected.

The court below only compounded the error of allowing the question of fear to be presented to the jury on this proof by submitting an instruction that strongly suggested that a professed fear of cancer is *ipso facto* genuine and serious. In *Ayers*, this Court emphasized that the adverse financial consequences on defendants identified by Justices KENNEDY and BREYER in dissent would be avoided, in part, through proper jury instruction. "[T]he dissents largely disregard . . . the verdict control devices available to the trial court. These include, on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious, a review of the evidence for sufficiency, and particularized verdict forms." *Ayers*, 538 U.S. at 159 n.19.

The Court below effectively deprived Illinois Central of a key "verdict control device," a proper jury instruction.[3] Specifically, the court below instructed the jury as follows:

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[3] Other jurisdictions have refused to instruct the jury on the "genuine and serious" standard altogether. *See Hedgecorth v.*

> If you decide for the plaintiff . . . on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages . . . .
>
> *The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future.*

Pet App. 63a (emphasis added). The implication of this instruction is that a fear of cancer is necessarily genuine and serious. The Court's decision in *Ayers* makes clear that compensable fear of cancer is not a foregone conclusion.

Neither of Illinois Central's proposed instructions suffers this defect. Had the trial court used either of them, the jury may well have declined to award damages for fear of cancer. Of note, in the trial of the first grouping of plaintiffs in this action, the Court issued a proper instruction: "In order to recover for fear of cancer a plaintiff must demonstrate that fear is genuine and serious." Having been properly instructed, the jury declined to award damages for fear of cancer on evidence almost identical to that adduced by the respondents here. Pet. App. 77a-80a.

Union Pacific R.R. Co., 210 S.W.3d 220, 226-29 (Mo. Ct. App. 2007) (affirming trial court's refusal to give separate instruction on definition of "genuine and serious"); *Hensley v. CSW Transp., Inc.*, No. E2007-00323-COA-R3-CV, 2008 WL 683755, *16 (Tenn. Ct. App. Mar. 14, 2008) (citing *Hedgecorth* in support of same result) Pet. App. 81a-119a.

II. THE JUDGMENT OF THE COURT BELOW DEEPENS THE EXISTING CONFLICT REGARDING THE DEFINITION OF "GENUINE AND SERIOUS."

The Courts applying Ayers have diverged over the definition of "genuine and serious." In *Seaford v. Norfolk S. Ry. Co.*, 824 N.E.2d 94, 111-12 (Ohio Ct. App. 2004), *rev'd on other grounds*, 835 N.E.2d 717 (Ohio 2005), the Court of Appeals of Ohio applied *Ayers* and properly ruled that a plaintiff's "worry" does not equate to "fear" and does not rise to the level of being "serious." There, the plaintiff testified regarding the possibility of future cancer, "I worry about it and the family is concerned about it." The court explained that, under *Ayers*, compensable fear requires more than testimony of "concern" or "worry" and reversed the trial court's denial of defendant's motion for directed verdict. *Id.*

Here, the Illinois courts allowed recovery on proof almost identical to that found insufficient in *Seaford*.[4] Plaintiff Copple, for example, testified that he was "concerned" and even "worried" about contracting cancer, testimony indistinguishable from the plaintiff's testimony in *Seaford*. Plaintiffs Heinrichsmeyer and Hyatt fare even more poorly under that standard.

The Court should grant certiorari to resolve this conflict, especially given the need for uniformity under FELA. H.R. Rep. No. 60-1386, at 3 (1908) (noting that one of the purposes of FELA was to

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[4] Tennessee likewise would allow recovery in the absence of objective evidence of "genuine and serious" fear. *See, e.g.*, *Hensley*, 2008 WL 683755, *15-*17 (allowing recovery on testimony of "anxiety").

"create uniformity throughout the Union" with respect to the "financial responsibility of railroads for injuries to their employees"). Moreover, this particular conflict creates a powerful incentive for forum shopping, a key concern under FELA given the latitude that FELA plaintiffs enjoy in selecting a forum. *See* 45 U.S.C. § 56.

III. THE RULE ADOPTED BY THE COURT BELOW THREATENS THE AVAILABILITY OF FUNDS FOR COMPENSATION OF LEGITIMATELY INJURED ASBESTOS CLAIMANTS.

The Court should grant certiorari to confirm and clarify the limited conditions under which damages for fear may be awarded to prevent those most severely injured by asbestos from being denied just compensation.

In *Ayers*, Justices KENNEDY and BREYER demonstrated in dissent that the rule adopted by the Court could threaten the availability of funds for claimants with the most debilitating and severe asbestos-related injuries. Justice KENNEDY noted that the latency period for mesothelioma, the most severe and debilitating asbestos-related cancer, is decades. *Ayers*, 538 U.S. at 168 (KENNEDY, J., dissenting) (citing, *inter alia*, A. Churg & F. Green, Pathology of Occupational Lung Disease 350 (2d ed. 1998) ("The latency period for asbestos-induced mesothelioma is long, with a mean value of 30 to 40 years")). Thus, the recovery of damages for questionable "fear" claims could deprive future mesothelioma sufferers from just compensation. *Id.* Justice KENNEDY demonstrated that this fear is not hypothetical:

> Asbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy, including 26 companies that have become insolvent since January 1, 2000. See RAND Institute for Civil Justice, S. Carroll et al., Asbestos Litigation Costs and Compensation: An Interim Report 71 (2002). With each bankruptcy the remaining defendants come under greater financial strain, see Edley & Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 392 (1993); M. Plevin & P. Kalish, What's Behind the Recent Wave of Asbestos Bankruptcies? 16 Mealey's Litigation Report: Asbestos 35 (Apr. 20, 2001), and the funds available for compensation become closer to exhaustion, see Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541, 547 (1992).

Id. at 169 (internal record citation omitted); *see also id.* at 186-87 (BREYER, J., dissenting).

The Court in *Ayers* acknowledged these concerns. To address them, the Court imposed the "important reservation" that any claim of fear be supported by evidence of "genuine and serious" injury and identified proper jury instruction as a "verdict control device" that would prevent unjust awards.

For these checks to be effective, however, they must be enforced, and the Court below did not do so. The Court below disregarded the "genuine and serious" standard. If that standard is to mean

anything, the question of awarding "fear" damages should not be submitted to the jury on such thin proof. Should that rule prevail more broadly, the dire consequences identified by the *Ayers* dissents may well come about. Moreover, the instruction offered by the Court is far from the "verdict control device" envisioned by the Court. It more fairly can be described as a "verdict enhancing device," as it strongly suggests that *any* concern over the possibility of contracting cancer in the future is necessarily "genuine and serious" fear.

This Court should grant certiorari to clarify the type of quantum of proof a plaintiff must adduce to recover damages for fear of cancer. And whatever standard is adopted, the Court should provide guidance as to the type of jury instruction that is appropriate to control against excessive and unjust verdicts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 27, 2008